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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RICHARD M. MITCHELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "contrary to law" provision of 18 U.S.C. § 545 encompasses conduct contrary to mere administrative regulations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard M. Mitchell hereby petitions for a writ of certiorari to review the judgment and opinion in this case of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 39 F.3d 465 (4th Cir. 1994). The order of the court of appeals denying the petition for rehearing (App. 36a-37a) is not reported. The August 13, 1993 judgment and commitment order of the United States District Court for the Eastern District of Virginia (App. 29a-35a) and the district court's August 17, 1993 order denying petitioner's motion for judgment of acquittal, or, alternatively, for a new trial (App. 28a), are not reported.

JURISDICTION

The opinion of the court of appeals was entered on November 3, 1994. Rehearing was denied on December 30, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18, Section 545 of the United States Code provides, in pertinent part, that

> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 545.

STATEMENT

On June 3, 1992, a grand jury sitting in the Eastern District of Virginia returned a nine-count indictment against petitioner Richard Mitchell. Count Nine of the indictment charged petitioner with importing animal horns and hides into the United States contrary to law, in violation of 18 U.S.C. § 545 (App. 2a), which makes it a felony, punishable by up to five years imprisonment, to "import[] or bring[] into the United States, any merchandise *contrary to law*" (emphasis added). Count Nine further alleged that the importation of the horns and hides was contrary to law solely because it contravened certain Customs Service, Fish and Wildlife Service, and Department of Agriculture regulations that required petitioner to make various declarations upon importation. App. 2a-3a.

1. Petitioner moved to dismiss Count Nine of the indictment on the grounds that the "contrary to law" provision of Section 545 does not criminalize conduct contrary to administrative regulations, and, alternatively, that a felony conviction under Section 545 could not be predicated upon violation of regulations for which Congress expressly had provided misdemeanor penalties. App. 3a. The district court denied petitioner's motion without opinion. *Id.*

The case was tried before a jury in May 1993. Petitioner was acquitted of Counts One through Eight, but the jury returned a general verdict convicting him of violating 18 U.S.C. § 545 as charged in Count Nine. App. 3a-4a. Petitioner thereafter moved for a judgment of acquittal or, in the alternative, for a new trial on Count Nine, which the court denied without opinion. *Id.* Petitioner was placed on probation for a term of two years and fined $1,000. *Id.* at 4a.

2. A divided court of appeals, over Judge Murnaghan's dissent, rejected petitioner's contention that the "contrary to law" provision of Section 545 reaches only conduct that violates acts of Congress, not conduct that violates administrative regulations. The panel declared that the plain meaning of "law" includes regulations having the force and effect of law, and that this meaning would control unless the legislative history demonstrated that Congress clearly intended a contrary meaning. *Id.* at 5a. The court also relied on the fact that Congress reenacted the "contrary to law" provision in 1922 and 1930, when, according to the panel, "it was well settled" that "law" included regulations having the force and effect of law, because of the decision in *Estes* v. *United States*, 227 F. 818 (8th Cir. 1915), of which the court presumed Congress was aware. App. 5a-7a. The court was not persuaded by the existence of other provisions in the 1922 and 1930 reenactments which referred to "law and regulations." *Id.* at 6a.

The court also rejected petitioner's contention that a felony conviction under Section 545 cannot be predicated upon the violation of regulations for which Congress specifically has provided misdemeanor penalties. See 16 U.S.C. § 1540(b) (penalty provision for criminal violations of the Endangered Species Act of 1973 and regulations promulgated thereunder); 21 U.S.C. § 122 (penalty provision for violations of 21 U.S.C. § 111, and regulations promulgated thereunder). First, the court noted the strong presumption against a finding of repeal by implication. App. 12a. The court reviewed the legislative histories of the statutes pursuant to which the relevant regulations were promulgated and concluded that Congress did not intend either to be the exclusive means of prosecuting violations of these regulations. *Id.* at 13a-14a. This conclusion, the court noted, was in accord "with the *majority of cases* dealing with repeal by implication in the context of a later enactment providing a lesser penalty for the same conduct subject to greater punishment under an earlier statute." *Id.* at 15a-16a (emphasis added).

Judge Murnaghan dissented, concluding that "it is grievously ambiguous whether failure to comply with a regulation is included within the statutory phrase 'contrary to law,' and that the rule of lenity should therefore be applied." *Id.* at 22a-23a. He observed that the panel gave "little attention to the confusion necessarily arising from the fact that many statutes say 'law and regulations,' and yet § 545 says only "contrary to law." *Id.* at 23a-24a (footnotes omitted). He undertook a close examination of the *Estes* case, and concluded that the majority's reliance on *Estes* was misplaced. *Id.* at 24a. Although the dissent found most of the Section 545 cases cited by petitioner and the government "unilluminating" as to whether "contrary to law" extends to regulatory violations, it stated that these cases "contribute[d] abundantly to the creation of ambiguity." *Id.* at 26a.

REASONS FOR GRANTING THE PETITION

The recurring and important issue of the meaning of the statutory term "contrary to law" was decided by the court of appeals in a way that perpetuates the longstanding confusion among the circuits on this issue. The need for uniform construction of this language is particularly acute because the phrase "contrary to law" is found in numerous federal criminal statutes and because the consequences attaching to this question of statutory construction involve the imposition of criminal liability including grievous loss of individual liberty. Accordingly, this Court should grant certiorari to resolve the acknowledged conflict and provide guidance to the lower courts in the interpretation of this federal criminal statute.

1. Although the "contrary to law" language currently codified at 18 U.S.C. § 545 has been part of the United States Code since 1866 (see An Act Further To Prevent Smuggling And For Other Purposes, ch. 201, § 4, 14 Stat. 178, 179 (1866)), before the decision below, no court had squarely held that this provision reached conduct that violated no statutory enactment but was merely contrary to administrative regulations. The decisions of this Court and the courts of appeals reveal analyses both supporting the conclusion reached by the Fourth Circuit and squarely at odds with the holding below.

The confusion regarding the proper construction of "contrary to law" can be traced to this Court's decisions in *United States* v. *Eaton*, 144 U.S. 677 (1892), and *United States* v. *Grimaud*, 220 U.S. 506 (1911). In *Eaton*, the Court considered whether failure to comply with a regulation promulgated pursuant to a statute subjected a defendant to penalties prescribed in that statute for "omit[ing], neglect[ing] or refus[ing] to do, or caus[ing] to be done, any of the things *required by law*." 144 U.S. at 685-86 (emphasis added). The Court held that it did not, stating that "[i]f Congress intended to make [violation of the regulation] an offence[,] . . . it would have done so distinctly." *Id.* at 688. The Court noted that reg-

ulations "may . . . have . . . the force of law[,] but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence." *Id.* In *Grimaud*, 220 U.S. at 514, the Court faced a similar issue—whether to sustain a conviction for violating regulations promulgated by the Secretary of Agriculture pursuant to the Forest Reserve Act of 1891. The Court distinguished *Eaton* and affirmed the conviction because the statute in question punished violations "of the provisions of this act *or such rules and regulations of the Secretary*," whereas the statute construed in *Eaton* contained no such express reference to regulations. *Id.* at 519 (emphasis added).

The opinion of the Eighth Circuit in *Estes* v. *United States*, 227 F. 818 (8th Cir. 1915), upon which the court below principally relied, reflects confusion as to the proper application of *Eaton* and *Grimaud*. In *Estes*, the defendant was charged with violating the predecessor to 18 U.S.C. § 545 by importing cattle into the United States without having them inspected by the Bureau of Animal Industry. *Id.* at 819. The defendant, relying on *Eaton*, argued that there was no law, within the meaning of the statute, that required such inspection. *Id.* at 820-21. The court held that "it was proper to allege in the indictment that the cattle in question had . . . been imported and brought into the United States from the republic of Mexico contrary to law" because regulations promulgated by the Secretary of Agriculture mandated inspection of all animals imported into the United States. *Id.* at 821-22. The *Estes* court relied on *Grimaud* to distinguish *Eaton*, apparently not recognizing that the statute under consideration in *Grimaud* explicitly extended to violations of regulations. *Id.* at 821. As the dissent below observed, the "contrary to law" provision of Section 545 lacks any such reference to regulations, thereby substantially undermining the *Estes* court's reliance on the *Grimaud* decision. See App. 24a.

For these reasons, the panel's reliance on *Estes* seems misguided, at best. The panel noted that the "contrary to law" provision now codified at Section 545 was reenacted in 1922 and 1930, after the *Estes* decision. *Id.* at 6a. Because Congress is presumed to be aware of judicial interpretations of a statute, the panel reasoned that Congress adopted the *Estes* interpretation when it reenacted the "contrary to law" language without change. *Id.* at 6a-7a. This analysis proves too much; it is more likely that Congress was aware of this Court's decisions in *Eaton* and *Grimaud* and the distinction drawn in those cases between statutes that expressly punish violations of regulations and those, such as Section 545, that do not. The legislative history cited by the panel thus supports the conclusion that the failure of Congress to amend Section 545 reflected an understanding that "contrary to law" did not encompass regulations. This interpretation, moreover, is consistent with the references to "law and regulations" elsewhere in the 1922 and 1930 acts, which the court below simply dismissed. *Id.* at 6a.

A number of other cases support the conclusion that "contrary to law" does not reach conduct that violates no statutory provisions. In *Keck* v. *United States*, 172 U.S. 434, 437 (1899), this Court stated that "importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific *statutory* requirements" (emphasis added). Similar reasoning was followed by the courts in *Goldberg* v. *United States*, 277 F. 211, 217 (8th Cir. 1921) ("contrary to law" means contrary to "some other act of Congress"); *Palmero* v. *United States*, 112 F.2d 922, 925 (1st Cir. 1940) ("to ascertain what is contrary to law reference must be made to some other *statutory* provision") (emphasis added); and *United States* v. *Lee*, 937 F.2d 1388, 1397 (9th Cir. 1991) ("one must always look to another *statute* . . . to determine whether a violation of section 545 has taken place"), *cert. denied*, 502 U.S. 1076 (1992) (emphasis added). Strict ad-

herence to this language by the Fourth Circuit unquestionably would have led to reversal of petitioner's conviction. See also *United States* v. *Menon*, 24 F.3d 550, 558 (3d Cir. 1994) (indictment sufficient even though it "did not specify the *statute* [defendant] had violated") (emphasis added); *United States* v. *Claybourn*, 180 F. Supp. 448, 451 (S.D. Cal. 1960) (Section 545 makes it a crime to "fail[] to comply with other *statutes*") (emphasis added).

Conversely, a number of cases contain language indicating that Section 545 prosecutions may be predicated merely upon violations of regulations. In *Goldman* v. *United States*, 263 F. 340 (5th Cir. 1920), the defendant argued that he should not be subject to double penalties as a result of prosecution under both the predecessor to Section 545 and another statute that imposed civil penalties. The court stated that "contrary to law" meant "in violation of any regulation . . . established by law." *Id.* at 343. Because the prosecution was predicated on a statutory violation and the distinction between law and regulations was not raised, however, the language extending Section 545 to regulatory violations is mere *dicta.*

Duke v. *United States*, 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958), and *Murray* v. *United States*, 217 F.2d 583 (9th Cir. 1954), are companion cases arising out of the prosecution of a group of individuals for smuggling and conspiring to smuggle birds from Mexico. In both cases, the court upheld convictions for Section 545 violations which apparently were premised upon importations "contrary to" a regulation promulgated by the Surgeon General, but the distinction between statutes and regulations in the context of Section 545 clearly was not at issue in either case. *Duke*, 255 F.2d at 723-24; *Murray*, 217 F.2d at 584-85. Similarly, in *United States* v. *Murphree*, 783 F.2d 605 (6th Cir.), *cert. denied*, 479 U.S. 839 (1986), the court upheld a Section 545 conviction based on the violation of a regulation, and the court in *United States* v. *Ivey*, 949 F.2d 759

(5th Cir. 1991), *cert. denied*, 113 S. Ct. 64 (1992), affirmed a Section 545 conviction premised on violations of a statute and a regulation. In neither case, however, did the parties raise or the court address whether "contrary to law" embraces conduct that is only contrary to regulations and violates no federal statutes.

The confusion engendered by the cases interpreting Section 545 is heightened by the use of "contrary to law" in other federal statutes. "Contrary to law(s)" appears at least 30 times in the United States Code, including several criminal statutes. See, *e.g.*, 18 U.S.C. § 544 (importations "contrary to law"); 18 U.S.C. § 1425 (making it a felony to procure, "contrary to law," the naturalization of any person); 18 U.S.C. § 1693 (making it a crime to carry mail "contrary to law"); 18 U.S.C. § 1697 (same); 19 U.S.C. § 1590 (transportation and possession of merchandise introduced into United States "contrary to law"); 19 U.S.C. § 1595a (seizure and forfeiture of merchandise introduced into United States "contrary to law" and of vessels used for same). The doctrine of *in pari materia* suggests that the courts should interpret similar statutory language in a consistent manner, and this rule applies with special force in the context of federal criminal statutes. See, *e.g.*, *Kungys* v. *United States*, 485 U.S. 759, 769-70 (1988) (interpreting "material" in the context of federal criminal statutes).

The potential for confusion absent guidance from this Court on the proper construction of "contrary to law" is exacerbated by the presence of numerous statutes which define prohibited or reviewable conduct as "contrary to law or regulation." See, *e.g.*, 10 U.S.C. § 618(a)(1) ("contrary to law or regulation"); 10 U.S.C. § 5898 (same); 14 U.S.C. § 261(a) (same); 14 U.S.C. § 289(f) (same); 14 U.S.C. § 290(d) (same); 21 U.S.C. § 134a ("contrary to any law or regulation"); see also 22 U.S.C. § 4137 ("contrary to laws or regulations" and "contrary to law" in same statute); 33 U.S.C. § 1233 (authorizing issuance of "regulations, not contrary to law"). These

provisions suggest, as stated by the Court in *Eaton*, 144 U.S. at 688, and contrary to the position taken by the court below, that when "Congress intend[s] to make [violation of regulations] an offence[,] . . . it [does] so distinctly." Given the importance of this issue, and the widespread use of the controversial statutory language in question, this Court should grant certiorari to resolve the confusion concerning the construction of "contrary to law" in Section 545 and other federal criminal statutes.

2. The decision below also presents the Court with the opportunity to clarify the relationship between two principles of statutory construction, the rule of lenity and the presumption against repeals by implication, as articulated in *United States* v. *Batchelder*, 442 U.S. 114 (1979), in the context of an ambiguous criminal statute. The court of appeals treated the issue of the proper construction of "contrary to law" and the issue of repeal by implication as two separate inquiries. First, the court found that the legislative history of Section 545 did not indicate that Congress intended to limit "contrary to law" to statutory violations. App. 5a. Second, the majority held that the question of repeal was governed by *Batchelder*, 442 U.S. at 121-22, which, in turn, held that prosecution under one statute is not improper merely because another statute provides a lesser penalty. App. 11a-12a, 14a. Although the court acknowledged the existence of a split among the circuits on the issue of repeal by implication, it questioned the continuing validity, in light of *Batchelder*, of those cases finding repeal by implication, such as *United States* v. *Omirly*, 488 F.2d 353 (4th Cir. 1973), and *United States* v. *Mueller*, 178 F.2d 593 (5th Cir. 1949). App. 15a-17a.

In *Omirly*, the defendant was convicted of making a false bomb threat while attempting to board an airplane, a misdemeanor under 49 U.S.C. § 1472(m)(1) (1976). *Omirly*, 488 F.2d at 355. She contended that she should have been prosecuted under 18 U.S.C. § 35(a), which had been amended to provide only a civil fine for such

violations. *Id.* The Fourth Circuit agreed, resting its holding on (1) the legislative history of § 35(a), which indicated an intent to repeal § 1472(m)(1) as applied to defendant's conduct, and (2) a finding that the two statutes were repugnant in their provisions for criminal penalties, including possible incarceration, on the one hand, and a civil fine, on the other. *Id.* at 356-57; see also App. 17a.

The court below distinguished *Omirly* on the grounds that it found no "clear statement of legislative purpose" to support a finding of repeal by implication in this case, and that the second basis for the *Omirly* decision, the conflict between the imposition of civil as opposed to criminal penalties, is no longer valid in light of the *Batchelder* decision. App. 17a. The court similarly concluded that the *Mueller* case, which turned on whether Congress' later enactment of a provision dealing specifically with lottery tickets manifested an intent to repeal the predecessor of Section 545 with respect to the importation of lottery tickets, also was undermined by *Batchelder. Id.*; see also *Callahan* v. *United States,* 285 U.S. 515, 518 (1932) (predecessor to Section 545 superseded the general provisions of a prior statute embracing the same subject).

Batchelder, however, does not control this case. In *Batchelder,* 442 U.S. at 121-22, this Court held that no conflict inheres in the fact that two statutes provide different penalties for the same conduct, and that legislative intent to repeal must be evident in a "positive repugnancy," *id.* (quoting *United States* v. *Borden Co.,* 308 U.S. 188, 189 (1939)), between the two statutes. The Court rejected the rule of lenity as a principle of construction because "in the instant case there is no ambiguity to resolve." *Id.* at 121. Moreover, the Court found ample evidence in the relevant legislative history that Congress intended that the two statutes at issue would "take nothing from" but merely "add to" and

"complement" one another. *Id.* at 120 (quoting 114 Cong. Rec. 14774, 16286 (1968)). Finally, the Court noted that a finding of repeal by implication would lead to anomalous results. *Id.* at 121 n.7. Based on the foregoing, the Court found no conflict or "positive repugnancy" between the statutes.

By treating separately the construction of "contrary to law" and the issue of repeal by implication, the court below failed to recognize that both issues are part and parcel of the same inquiry into the meaning of Section 545. The court was untroubled by the split among the circuits as to repeal by implication because it read *Batchelder* as resolving the conflict, while at the same time relying on *Batchelder* to resolve the apparent conflict between two statutes, when it is not clear whether Section 545 even applies to the conduct at issue. This Court's decision in *Simpson* v. *United States,* 435 U.S. 6 (1978), suggests that in such a case the presumption against implied repeals arguably gives way to the rule of lenity. In *Simpson,* the Court considered whether Congress intended to subject the defendant to multiple penalties for a single criminal transaction. The Court held that to construe one statute to allow the additional penalty authorized by that statute to be added to the penalty already provided by another statute would violate the rule of lenity. *Id.* at 14. The Court also relied on a "corollary of the rule of lenity" which gives "precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern," stating that this guide to statutory construction "has special cogency where a court is called upon to determine the extent of the punishment to which a criminal defendant is subject." *Id.* at 15.

This analysis suggests that the distinction drawn by the court below between the construction of "contrary to law" and the issue of repeal by implication was an artificial one, and that the court's reliance on *Batch-*

elder was misplaced. This Court should grant certiorari to resolve the apparent conflict between application of the rule of lenity and the presumption against implied repeals in the interpretation of ambiguous criminal statutes and to clarify both the relationship between *Batchelder* and *Simpson*, and whether *Batchelder* undermines the validity of cases such as *Omirly* and *Mueller*.

* * * *

This Court should grant certiorari to resolve the confusion in the lower federal courts on the proper construction of "contrary to law" in Section 545 that has its source in this Court's own prior decisions. Interpretation of this federal criminal statute presents an issue of fundamental and recurring importance, both in terms of the consequences to defendants of inconsistent application by the lower courts and because the "contrary to law" language is contained in numerous other federal criminal provisions. In addition, this case affords the Court an opportunity to clarify the appropriate mode of statutory construction when an ambiguous statute arguably criminalizes conduct for which another statute provides lesser penalties.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 30, 1995

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-5728

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD M. MITCHELL,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Claude M. Hilton, District Judge
(CR-92-238-A)

Argued: June 10, 1994

Decided: November 3, 1994

Before MURNAGHAN, WILKINS, and WILLIAMS,
Circuit Judges

OPINION

WILKINS, Circuit Judge:

Richard M. Mitchell appeals his conviction of importing merchandise contrary to law in violation of 18 U.S.C.A. § 545 (West 1976). He principally argues that the "contrary to law" provision of § 545 embraces only violations of other acts of Congress, not administrative regulations. In the alternative, he maintains that his felony

conviction under § 545 cannot be predicated on administrative regulations for which Congress has provided misdemeanor penalties. We disagree and accordingly affirm Mitchell's conviction.

I.

Mitchell was employed by the Fish and Wildlife Service of the United States Department of the Interior (FWS). His responsibilities included implementing international wildlife conservation programs, advising persons of the requirements for importing and exporting wildlife, and reviewing import and export applications. Outside his employment at the FWS, Mitchell booked big-game hunting trips to Asia and promoted sport-hunting programs of exotic wild animals.

An acquaintance of Mitchell, Don Cox, travelled to the Punjab Province of Pakistan where he illegally hunted and killed two Punjab urials and a Chinkara gazelle. Because he could not obtain permits from Pakistani wildlife authorities to export the hides and horns, Cox arranged to have Mitchell smuggle them out of Pakistan and into the United States.

On September 25, 1987, Mitchell arrived with the contraband at Dulles International Airport. He completed a United States Customs Service Declaration Form 6059-B (Customs Form 6059-B), but did not declare the hides and horns. Further, Mitchell did not complete a FWS Declaration for Importation or Exportation of Fish or Wildlife Form 3-177 (FWS Form 3-177). And, Mitchell failed to disclose that he was importing untanned animal hides into the United States.

In June 1992, a grand jury returned a nine-count indictment against Mitchell in which he was charged with numerous offenses relating to his business activities and to his bringing the hides and horns into the United States. Count Nine charged Mitchell with violating 18 U.S.C.A. § 545 by importing merchandise contrary to law in that he failed to:

(1) declare the items to a Customs officer as required by 19 C.F.R. § 148.11 (1987) ("the Customs regulation");

(2) file a completed FWS Form 3-177 as required by 50 C.F.R. § 14.61 (1986) ("the FWS regulation"); and

(3) show the country of origin of the hides and horns on a commercial invoice or in some other manner satisfactory to the Deputy Administrator of Veterinary Services as required by 9 C.F.R. § 95.2 (1987) ("the Agriculture regulation").[1]

Mitchell moved to dismiss Count Nine on the grounds that the "contrary to law" provision of § 545 does not embrace violations of administrative regulations and that a felony conviction under § 545 could not be predicated upon a violation of the FWS regulation for which Congress had provided a misdemeanor punishment under 16 U.S.C.A. § 1540(b) (West 1985).[2] The district court denied the motion.

With respect to the regulations set forth in Count Nine, the district court instructed the jury in the disjunctive, stating that it need only find that one of the regulations had been violated in order to convict Mitchell. Mitchell agreed to this instruction. Although Mitchell was acquitted of Counts One through Eight, the jury returned a general verdict of guilt on Count Nine. The district court

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[1] Count Nine of the indictment also charged Mitchell with failing to comply with the handling and treatment requirements of 9 C.F.R. §§ 95.5, 95.6 (1987). However, it appears that the district court charged the jury with only the country of origin requirements of § 95.2. We therefore focus on Mitchell's violation of § 95.2, but note that our analysis would reach the same result with respect to §§ 95.5 and 95.6.

[2] Mitchell did not raise the same argument with respect to the Agriculture regulation although Congress had also provided for the violation of this regulation to be punished as a misdemeanor.

denied Mitchell's motion for a new trial or in the alternative for a judgment of acquittal, sentenced Mitchell to two years probation, and imposed a $1,000 fine and a $50 special assessment.

II.

Section 545 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law . . . [s]hall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C.A. § 545 (West 1976). Mitchell principally contends that the "contrary to law" provision of § 545 embraces only conduct that violates acts of Congress, not conduct that violates administrative regulations. In the alternative, Mitchell contends that the "contrary to law" provision of § 545 is ambiguous concerning whether it includes violations of regulations and that the rule of lenity therefore should apply. We review de novo the proper interpretation of a statutory provision, including whether the provision is ambiguous. *United States v. Hall*, 972 F.2d 67, 69 (4th Cir. 1992).

A.

In determining the scope of the "contrary to law" provision of § 545, we first examine the language of the statute. *Moskal v. United States*, 498 U.S. 103, 108 (1990). Because the word "law" within the meaning of § 545 is not defined, we must give the word its ordinary meaning. *Id.* "Law" is commonly defined to include administrative regulations. *See Black's Law Dictionary* 796 (5th ed. 1979); *see also The Random House College Dictionary* 759 (rev. ed. 1980). In concluding that the

word "law" in the "authorized by law" provision of 18 U.S.C.A. § 1905 (West 1984) included administrative regulations, the Supreme Court observed:

> It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the "force and effect of law." This doctrine is so well established that agency regulations implementing federal statutes have been held to preempt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in § 1905 could be held to have a narrower ambit than the traditional understanding.

Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979) (footnotes omitted). Thus, the plain meaning of "law" includes regulations having the force and effect of law.

The plain language of the statute will control unless the legislative history demonstrates that Congress clearly intended a contrary meaning. *See Reves v. Ernst & Young*, 113 S.Ct. 1163, 1169 (1993). Mitchell contends that the ordinary meaning of the word "law" cannot be applied because when Congress enacted the "contrary to law" provision of § 545 in 1866,[3] regulations were fairly uncommon and thus Congress could not have intended to include administrative regulations. Our review of the available legislative history of § 545 discloses nothing to indicate that Congress clearly intended for the "contrary to law" provision to be limited to statutory violations.[4] Further, the "contrary to law" provision now codified at § 545 was

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[3] *See* Act of July 18, 1866, ch. 201, § 4, 14 Stat. 178, 179 (1866).

[4] We note also that in considering the meaning of the term "law" in the "authorized by law" provision of § 1905, the Supreme Court was untroubled by the fact that Congress had initially adopted the "authorized by law" language in 1864, when no legislative history indicated that Congress intended to limit the meaning of the provision to statutes. *See Chrysler Corp.*, 441 U.S. at 295-98.

reenacted in 1922 and 1930. *See* Tariff Act of 1922, ch. 356, § 593, 42 Stat. 858, 982 (1922); Tariff Act of 1930, ch. 497, § 593, 46 Stat. 590, 751 (1930).[5] Prior to the 1922 and 1930 reenactments, it was well settled that the word "law" included substantive regulations having the force and effect of law. *See, e.g., Maryland Casualty Co. v. United States,* 251 U.S. 342, 349 (1920). Furthermore, the only court to have considered whether the "contrary to law" provision of the predecessor to § 545 encompassed violations of administrative regulations prior to these reenactments concluded that it did. *Estes v. United States,* 227 F. 818, 821-22 (8th Cir. 1915) ("contrary to law" includes regulations lawfully promulgated by the Secretary of Agriculture). "Congress is presumed to be aware of . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard, a Div. of Loew's Theatres, Inc. v. Pons,* 434 U.S. 575, 580 (1978) (citations omitted).[6] Because Congress reenacted the pred-

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[5] Section 593 was later recodified as 18 U.S.C.A. § 545. *See* Act of June 25, 1948, ch. 645, § 545, 62 Stat. 683, 716 (1948).

[6] We note that some provisions enacted in the 1922 and 1930 Tariff Acts refer to "law and regulations." The Supreme Court has stated that when " 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States,* 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972)). However, "[t]he presumption loses some of its force when the sections in question are dissimilar and scattered at distant points of a lengthy and complex enactment." *United States v. Granderson,* 114 S. Ct. 1259, 1272 (1994) (Kennedy, J., concurring). We are not persuaded that the existence of these provisions indicates clear congressional intent to limit the meaning of "contrary to law" to statutes. Because the references in the 1922 and 1930 Tariff Acts to "law and regulations" are not used in the context of conduct "contrary to law and regulations," we cannot presume that Congress was acting purposely to exclude regulations from the "contrary to law" provision of § 545. This conclusion is buttressed by the fact that the legislative histories of the 1922 and 1930 Tariff Acts are silent as to the intended effect of new provisions referring to "law and regulations" on § 545. Silence is an unreliable source

ecessor to § 545 with knowledge that the "contrary to law" provision had been interpreted to include regulations having the force and effect of law, we cannot conclude that Congress evinced a clear intent that § 545 does not encompass administrative regulations.[7] Thus, we conclude that the "contrary to law" provision is unambiguous.

When ambiguity exists, "the ambit of criminal statutes should be resolved in favor of lenity." *United States v.*

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of legislative intent. *See Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in" statutory interpretation.); *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 242 (D.C. Cir. 1981) ("Drawing inferences as to congressional intent from silence in legislative history is always a precarious business."). In any event, at best the presumption articulated in *Russello* conflicts with the presumption that Congress adopts judicial interpretations of a statute when it reenacts the statute without change. We are unable to glean clear congressional intent to indicate that the "contrary to law" provision does not encompass administrative regulations on the basis of conflicting presumptions. We therefore conclude that the mere existence of these provisions does not indicate a clear congressional intent to limit the meaning of the "contrary to law" provision of § 545. In the absence of a clear indication that Congress intended these provisions to have some effect on § 545, we will not create an ambiguity by juxtaposing § 545 with those provisions. *See United States v. Blannon*, 836 F.2d 843, 845 (4th Cir.) ("[A] court may not manufacture an ambiguity in order to defeat Congress' intent."), *cert. denied*, 486 U.S. 1010 (1988).

[7] In addition, Mitchell emphasizes that in other statutes Congress has used the phrase "contrary to law or regulation." *See, e.g.*, 10 U.S.C.A. § 618(a) (West Supp. 1994); 10 U.S.C.A. § 5898(a) (West Supp. 1994); 14 U.S.C.A. § 261(a) (West 1990); 14 U.S.C.A. § 289(f) (West 1990); 14 U.S.C.A. § 290(d) (West Supp. 1994); 22 U.S.C.A. § 4131(a)(1)(A) (West 1990); *see also* 10 U.S.C.A. § 905(1) (West 1983) ("contrary to law, custom, or regulation"); 22 U.S.C.A. § 4137(b)(2) (West 1990) ("authorized by laws or regulations"). These statutes relate to Armed Forces and Coast Guard selection boards, Foreign Service personnel grievances, and prisoner of war conduct under the Uniform Code of Military Justice. Mitchell's citation of these provisions does nothing to advance his claim because the language of these unrelated statutes does not assist us in determining Congress' intent with respect to the meaning of § 545. *See Russello*, 464 U.S. at 25 ("Language in one statute usually sheds little light upon the meaning of different language in another statute . . . .").

Bass, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States,* 401 U.S. 808, 812 (1971)). However, the rule of lenity does not apply unless a " 'grievous ambiguity or uncertainty,' " *Chapman v. United States,* 500 U.S. 453, 463 (1991) (quoting *Huddleston v. United States,* 415 U.S. 814, 831 (1974)), remains even after we have looked to the language, structure, and legislative history of the statute, *Moskal,* 498 U.S. at 108. Because § 545 is not ambiguous, we decline to apply the rule of lenity.

B.

Mitchell also claims that the "contrary to law" provision of § 545 does not reach conduct violative of the Customs, FWS, and Agriculture regulations. Because we conclude that § 545 reaches conduct contrary to regulations having the force and effect of law, we must determine whether the regulations on which the Government relied meet this requirement. For regulations to have the force and effect of law they must first be "substantive" or "legislative-type" rules, as opposed to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." *Chrysler Corp.,* 441 U.S. at 301-02 (internal quotation marks omitted). An inherent characteristic of a "substantive rule" is that it is "one 'affecting individual rights and obligations.' " *Id.* at 302 (quoting *Morton v. Ruiz,* 415 U.S. 199, 232 (1974)). Second, the regulation must have been promulgated pursuant to a congressional grant of quasi-legislative authority. *Id.* Third, the regulation must have been promulgated in conformity with congressionally-imposed procedural requirements such as the notice and comment provisions of the Administrative Procedure Act (APA), 5 U.S.C.A. § 553(b), (c) (West 1977). *See id.* at 303.

It is beyond question that the regulations Mitchell was charged with violating affect individual rights and obligations and are therefore substantive rules, satisfying the first prong of the *Chrysler* test. The Customs regulation

requires individuals to declare every item brought into the United States. *See* 19 C.F.R. § 148.11. Similarly, the FWS regulation requires persons importing wildlife into the United States to complete, sign, and file a FWS Form 3-177 upon entry at a designated port unless certain exceptions, not relevant here, apply. *See* 50 C.F.R. § 14.61. Finally, the Agriculture regulation prohibits individuals from importing hides and horns into the United States unless country of origin disclosure requirements are met. *See* 9 C.F.R. § 95.2.

We also conclude that the regulations satisfy the second prong of the *Chrysler* test, as they were promulgated pursuant to congressional grants of quasi-legislative authority and do not exceed the scope of those grants of authority. The Customs regulation was promulgated pursuant to, *inter alia,* 19 U.S.C.A. § 1498 (West 1980 & Supp. 1994). *See* 38 Fed. Reg. 2449, 2450 (1973). Section 1498 explicitly authorizes the Secretary of the Treasury "to prescribe rules and regulations for the declaration and entry of . . . [a]rticles carried on the person or contained in the baggage of a person arriving in the United States." 19 U.S.C.A. § 1498(a)(7) (West Supp. 1994). Thus, we conclude that the Customs regulation, which requires the declaration of "[a]ll articles brought into the United States by any individual," was within the delegation of authority contemplated by Congress in enacting § 1498.

The FWS regulation was promulgated pursuant to, *inter alia,* § 1540(f) of the Endangered Species Act of 1973, 16 U.S.C.A. § 1540(f) (West 1985). *See* 45 Fed. Reg. 56,668, 56,673 (1980). Specifically, § 1540(f) contains an express grant of authority to the Secretary of the Interior "to promulgate such regulations as may be appropriate to enforce [chapter 35 of this title]." 16 U.S.C.A. § 1540(f). Chapter 35 includes a prohibition on the importation of any endangered species of fish or wildlife, including any dead body or part thereof. *See* 16 U.S.C.A. §§ 1532(8), 1538(a)(1)(A) (West 1985). Therefore, we conclude that Congress authorized the

promulgation of the FWS regulation and contemplated the requirement that persons bringing game trophies into the United States complete a FWS Form 3-177 so that it can be determined whether those trophies came from endangered species of fish or wildlife.

The Agriculture regulation was promulgated pursuant to 21 U.S.C.A. § 111 (West 1972). *See* 28 Fed. Reg. 5981, 5982 (1963). Section 111 provides:

> The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals . . . from a foreign country into the United States . . . and to seize, quarantine, and dispose of . . . any meats, hides, or other animal products coming from an infected foreign country to the United States.

21 U.S.C.A. § 111. We conclude that in § 111 Congress authorized and contemplated the promulgation of regulations that prohibit the importation of animal products "unless there be shown upon the commercial invoice, or in some other manner satisfactory to the Deputy Administrator, Veterinary Services, the name of the country of origin of such product or material." 9 C.F.R. § 95.2.

Lastly, we examine the process by which the regulations were promulgated to determine whether all procedural requirements imposed by Congress were met. Our review of the relevant entries in the Federal Register reveals that the regulations Mitchell was charged with violating were promulgated in compliance with all applicable procedural requirements. *See* 45 Fed. Reg. 56,668 (1980) (FWS regulation); 38 Fed. Reg. 2448 (1973) (Customs regulation).[8] We therefore conclude that those

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[8] The Agriculture regulation was first codified in 9 C.F.R. § 95.2 (1938) prior to the original enactment of the APA, ch. 324, 60 Stat. 237 (1946), which provided that "no procedural requirement [was]

regulations conform with all applicable procedural requirements and that they satisfy the third prong of the *Chrysler* test. *See Chrysler Corp.*, 441 U.S. at 303.

Because the regulations Mitchell was charged with violating affect individual rights and obligations, were authorized and contemplated by appropriate grants of quasi-legislative authority, and were promulgated in conformity with applicable procedural requirements, we conclude that those regulations have the force and effect of law and therefore are encompassd by the "contrary to law" provision of § 545.

III.

Finally, Mitchell argues that even if the "contrary to law" provision of § 545 encompasses violations of administrative regulations having the force and effect of law, his § 545 felony conviction cannot be predicated upon a violation of the FWS or Agriculture regulations. This is so, he asserts, because Congress has specifically provided misdemeanor penalties for the violation of these regulations.[9] *See* 16 U.S.C.A. § 1540(b) (West 1985) (penalty provision for violations of the Endangered Species Act of 1973 (ESA) and regulations promulgated thereunder); 21 U.S.C.A. § 122 (West Supp. 1994) (penalty provision for violations of 21 U.S.C.A. § 111 ("the Agriculture statute") and regulations promulgated thereunder). Therefore, the same conduct cannot be prosecuted as a felony.

It is well settled that no inherent difficulty exists in Congress' criminalizing the same conduct under two different statutes, one of which provides for misdemeanor

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mandatory as to any agency proceeding initiated prior to the effective date of such requirement," § 12, 60 Stat. at 244.

[9] For purposes of addressing Mitchell's argument, we assume without deciding that the statutes pursuant to which the regulations were promulgated provide only misdemeanor punishment for the violation of those regulations.

and the other felony punishment. *See United States v. Batchelder*, 442 U.S. 114, 122-26 (1979). And, we can discern no significant difference between two statutes which are independently violated by the same conduct and two statutes which are both violated because one statute serves as a predicate to the violation of the other. Thus, because Mitchell's conviction under § 545 is not impermissible in principle, his argument must be that his § 545 conviction is invalid because the subsequently promulgated regulations repealed by implication the applicability of § 545 to his actions.

At the outset, we note that a " 'strong presumption' " exists against repeal by implication, *Blevins v. United States*, 769 F.2d 175, 181 (4th Cir. 1985) (quoting *Ely v. Velde*, 451 F.2d 1130, 1134 (4th Cir. 1971)), and that it is " 'a cardinal principle of statutory construction that repeals by implication are not favored,' " *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976)). When two acts touch upon the same subject, both should be given effect if possible, *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), because the

> rationale of the presumption [against implied repeal] . . . is not that Congress is unlikely to change the law . . . but rather, that Congress "legislate[s] with knowledge of former related statutes," and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertanties of implication compounded by the vagaries of judicial construction.

United States v. Hansen, 772 F.2d 940, 944-45 (D.C. Cir. 1985) (quoting *Continental Ins. Co. v. Simpson*, 8 F.2d 439, 442 (4th Cir. 1925)), *cert. denied*, 475 U.S. 1045 (1986).

Thus, a repeal by implication will only be found when there is clear legislative intent to support it. *United States*

v. Joya-Martinez, 947 F.2d 1141, 1144 (4th Cir. 1991). Or, stated differently, a later act will not repeal an earlier one in the absence of a clear and manifest intention of Congress. *Borden*, 308 U.S. at 198. A court may find the requisite degree of intent when (1) "the two acts are in irreconcilable conflict,' " or (2) " 'the later act covers the whole subject of the earlier one and is clearly intended as a substitute.' " *Radzanower*, 426 U.S. at 154 (quoting *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936)). Mitchell's appeal arguably presents us with the former situation.

Statutory provisions will not be considered to be in irreconcilable conflict unless there is a "positive repugnancy" between them such that they "cannot mutually coexist." *Radzanower*, 426 U.S. at 155. Determination of whether statutes may coexist requires an inquiry into the legislative history and the language of the statutes themselves. *See Morton v. Mancari*, 417 U.S. 535, 550 (1974); *see also Joya-Martinez*, 947 F.2d at 1144.

An examination of the legislative histories of the ESA and the Agriculture statute reveals nothing to indicate that either was intended by Congress to be the exclusive means of prosecuting violations of regulations promulgated pursuant to these Acts. The House and Senate Reports on the ESA, although addressing the general question of penalties for violations, refer only to the penalties provided in the ESA itself; there is no evidence that these penalties were provided as a substitute for prosecution under any other statute. *See* H.R. Rep. No. 412, 93d Cong., 1st Sess. (1973); S. Rep. No. 307, 93d Cong., 1st Sess. (1973). Nor does the conference report discuss the relationship of the ESA to other criminal penalties such as § 545. *See* H.R. Conf. Rep. No. 740, 93d Cong., 1st Sess. (1973). Similarly, the legislative history of the Agriculture statute is entirely devoid of any discussion of the applicable penalty provision, 21 U.S.C.A. § 122. *See* H.R. Rep. No. 2819, 57th Cong., 2d Sess.

(1902). There is thus no evidence of a congressional intent to repeal the application of § 545 to the acts made criminal by the ESA and the Agriculture statute, much less a clear and manifest intention of Congress to that effect.

We next examine the statutory provisions themselves. One statutory provision will repeal another " 'only if necessary to make the [later enacted law] work.' " *Radzanower*, 426 U.S. at 155 (alteration in original) (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963)). The continued applicability of § 545 to conduct violative of the regulations in no way impairs the effectiveness of the regulations. Moreover, there is no reason to infer that Congress, simply by later providing for misdemeanor punishment for violations of the FWS and Agriculture regulations under 16 U.S.C.A. § 1540(b) and 21 U.S.C.A. § 122, intended to preclude prosecution for a felony under § 545. Enactment of a statute with a penalty provision differing from a previously enacted statute is not adequate to show that the statutes are in irreconcilable conflict. *See Radzanower*, 426 U.S. at 155. "It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem." *Id.*; *cf. Batchelder*, 442 U.S. at 122 (1979) (holding that repeal by implication does not exist merely because the same conduct is criminalized by two statutes, one of which provides greater punishment).[10]

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[10] Mitchell directs our attention to *United States v. Yuginovich*, 256 U.S. 450 (1921). The *Yuginovich* Court held that § 35 of the Volstead Act implicitly repealed certain revenue statutes, relying in part on the proposition that a later statute, applying to the same conduct and providing a lesser penalty, supersedes an earlier statute providing a greater penalty. It is somewhat unclear from the text of the opinion whether the Court concluded that repeal by implication resulted because the provisions were in irreconcilable conflict or because the Volstead Act covered the whole subject matter of and was intended as a substitute for the revenue statutes. Never-

Our decision that the ESA and the Agriculture statute do not repeal by implication the applicability of § 545 to Mitchell's conduct is in accord with the majority of cases dealing with repeal by implication in the context of a later enactment providing a lesser penalty for the same conduct subject to greater punishment under an

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theless, *Yuginovich* does not control our analysis regardless of which interpretation is correct. To the extent that *Yuginovich* held that the existence of a less severe penalty was conclusive evidence of an irreconcilable conflict between two statutory provisions, it has been overruled by *Batchelder*. Although *Batchelder* involved two contemporaneously-enacted statutes that provided different penalties for the same conduct, the Court clearly held that differing penalty provisions alone do not evidence a positive repugnancy between penal statutes. *Batchelder*, 442 U.S. at 122. However, it is much more likely that the *Yuginovich* Court held that the Volstead Act repealed the revenue statutes dealing with alcohol because the former was a comprehensive enactment intended as a substitute. Neither the Government nor Yuginovich claimed that any provision of the Volstead Act was in direct conflict with the revenue statutes. *Yuginovich*, 256 U.S. at 452-53, 457. Rather, Yuginovich argued to the Court that the Volstead Act "comes within the rule that a statute covering the whole subject-matter of a former one . . . operates . . . by way of substitution, and impliedly repeals the former." *Id.* at 457. The Court apparently adopted this view, referring to the radical policy change effected by the "comprehensive" Eighteenth Amendment and legislation thereunder. *See id.* at 459-60. The Court then construed the language of § 35 "in view of" the Eighteenth Amendment and the Volstead Act and concluded that Congress did not intend to preserve the applicability of the revenue statutes after passage of the Volstead Act. *Id.* at 463-64. The relationship between the Volstead Act and the revenue statutes is dissimilar to the relationship between § 545, the ESA, and the Agriculture statute. These statutes deal with different subject matters and overlap only in particular factual situations. *See United States v. Radetsky*, 535 F.2d 556, 567-68 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976). And, there is no indication that the ESA and the Agriculture statute are intended as substitutes for § 545. *Id.* We therefore conclude that to the extent that the *Yuginovich* Court held that the Volstead Act implicitly repealed the revenue statutes because it was a comprehensive enactment providing a lesser penalty, it is inapposite to Mitchell's appeal.

earlier statute. *See, e.g., United States v. Hansen,* 772 F.2d 940, 943-49 (D.C. Cir. 1985) (finding that later enactment of the Ethics in Government Act of 1978, providing civil penalty for violations, did not repeal by implication the applicability of 18 U.S.C.A. § 1001 (West 1976), providing for felony punishment, to fraudulent financial disclosure report); *United States v. Gordon,* 548 F.2d 743, 744 (8th Cir. 1977) (later enactment of statute providing misdemeanor penalty for Medicare fraud did not preclude felony prosecution under § 1001); *United States v. Burnett,* 505 F.2d 815, 816 (9th Cir. 1974) (per curiam) (holding later enactment of statute providing misdemeanor penalty for false statements to obtain unemployment benefits for prior federal service did not preclude felony prosecution under § 1001), *cert. denied,* 420 U.S. 966 (1975); *Roseman v. United States,* 364 F.2d 18, 24-27 (9th Cir. 1966) (finding that later enactment of the Federal Food, Drug and Cosmetics Act of 1938, which provided misdemeanor penalty for violations, did not repeal by implication the applicability of § 545 to the importation of inadequately labelled LSD), *cert. denied,* 386 U.S. 918 (1967); *United States v. Kushner,* 135 F.2d 668, 670-71 (2d Cir.) (finding that later enactment of the Gold Reserve Act did not repeal by implication the application of the predecessor to § 545 to the importation of gold bullion), *cert. denied,* 320 U.S. 808 (1943). *But see United States v. Omirly,* 488 F.2d 353, 356-57 (4th Cir. 1973) (finding repeal by implication where Congress later reduced the penalty in one statute from a misdemeanor to a civil fine but failed to similarly amend a parallel provision in the statute of conviction); *United States v. Mueller,* 178 F.2d 593, 594 (5th Cir. 1950) (affirming dismissal of indictment charging violation of § 545 for importation of lottery tickets based on the conclusion that subsequent enactment of statute dealing specifically with lotteries and lottery tickets, and providing for lesser punishment, indicated legis-

lative intent to withdraw lottery tickets from the purview of the predecessor to § 545).[11]

Even if we were to determine that a conflict existed among § 545, the ESA, and the Agriculture statute, § 545 would control as the more specific statute. *See Farmer v. Employment Sec. Comm'n of N.C.*, 4 F.3d 1274, 1283 (4th Cir. 1993) (when statutes are in irreconcilable conflict, "statutes narrowly applicable to the

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[11] Our decision in *United States v. Omirly*, 488 F.2d 353 (4th Cir. 1978), is not controlling. Omirly was convicted of making a false bomb threat while attempting to board an aircraft in violation of 49 U.S.C.A. § 1472(m)(1) (West 1976), a misdemeanor. Omirly contended that she should have been prosecuted under 18 U.S.C.A. § 35(a) (West 1969) because it also criminalized her conduct, but had been amended to provide only a civil fine for violations, thus indicating congressional intent to repeal the applicability of § 1472(m)(1) to her conduct. This court agreed, resting our decision on two indications of congressional intent. First, we concluded that the legislative history of § 35(a) indicated intent to repeal § 1472(m)(1) as applied to Omirly's conduct. The expressed view of the Department of Justice, adopted by Congress in amending § 35(a), was that providing only a civil penalty for nonmalicious false bomb threats would increase the likelihood of achieving punishment in cases where juries would be reluctant to find the defendant criminally liable. As noted above, we are not blessed with the kind of clear statement of legislative purpose that informed the decision of this court in *Omirly*. Second, *Omirly* rested on the conclusion that the two statutes were "repugnant in their provisions for criminal procedures and possible incarceration on the one hand as against a civil proceeding with a maximum penalty of $1000 on the other." *Omirly*, 488 F.2d at 357. This basis for the *Omirly* decision is no longer valid in light of the subsequent ruling of the Supreme Court in *Batchelder*, which indicates that prosecution of Omirly under § 1472 was not improper merely because § 35(a) provided a lesser penalty. *See Batchelder*, 442 U.S. at 122; *see also Radzanower*, 426 U.S. at 155. In addition, the result in *United States v. Mueller*, 178 F.2d 593 (5th Cir. 1950), which apparently gleaned congressional intent to repeal the predecessor to § 545 with respect to the importation of lottery tickets based on Congress' later enactment of a provision dealing specifically with lottery tickets and providing for a lesser penalty, is also undermined by *Batchelder*.

circumstances at hand control over more generalized provisions"); *see also Roseman,* 364 F.2d at 25 (examination of dates of enactment and relative specificity only appropriate when statutes are in conflict). The reasoning of *Callahan v. United States,* 285 U.S. 515 (1932), persuades us that the regulations promulgated pursuant to the ESA and the Agriculture statute are not more specific than § 545 when applied to Mitchell's conduct. Callahan challenged his conviction under § 593 of the Tariff Act (the predecessor to § 545) for importing intoxicating liquors contrary to law. He claimed he should have been prosecuted under the National Prohibition Act rather than § 593, because the National Prohibition Act dealt only with liquor, including its importation, and provided a lesser penalty. The Court rejected this argument, concluding that although the National Prohibition Act dealt specifically with liquor, the relevant penalty provision of the Act applied generally to many violations of the Act and did not provide a specific penalty for importation. Section 593 applied only to importation, and was therefore the more specific statute. *Callahan,* 285 U.S. at 517-18; *see also Murray v. United States,* 217 F.2d 583, 585 (9th Cir. 1954) (holding that penalty for importation of merchandise contrary to law under § 545 is more specific than general misdemeanor penalty provided for violations of regulations prohibiting the importation of psittacine birds, regardless of when each provision was enacted). Likewise, the penalty provisions relevant to violations of regulations promulgated pursuant to the ESA, 16 U.S.C.A. § 1540(b), and to violations of regulations promulgated pursuant to the Agriculture statute, 21 U.S.C.A. § 122, apply generally to any violation of the statutes or regulations promulgated thereunder; no specific penalties are provided for importation.[12] These

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[12] Section 1540(b) provides, in relevant part:

> Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of

general penalty provisions are like the penalty provision in the National Prohibition Act in that they provide the measure of punishment for numerous violations, including importation. As in *Callahan*, these provisions cannot be said to supersede the specific penalty provided in § 545 for importation of merchandise contrary to law.[13]

Our conclusion that there is no irreconcilable conflict between § 545 and the FWS and Agriculture regulations is further supported by the fact that the goals of § 545, the ESA, and the Agriculture statute are not in conflict. *Cf. United States v. Fausto*, 484 U.S. 439 (1988) (find-

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> any regulation [promulgated under] . . . section 1538 of this title shall, upon conviction, be fined not more than $20,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than six months, or both.

16 U.S.C.A. § 1540(b)(1).

Section 122 provides, in relevant part:

> Any person . . . knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment.

21 U.S.C.A. § 122.

[13] Mitchell also refers the court to *Palmero v. United States*, 112 F.2d 922 (1st Cir. 1940). However, *Palmero* is inapposite. It held that the importation of opium could not be punished under the predecessor to § 545 because the legislative history of the subsequent Opium Act clearly indicated that Congress intended to withdraw opium from the term "merchandise." *Id.* at 925. The court concluded that the predecessor to § 545 did not apply to Palmero's conduct and thus could not conflict with the Narcotic Drugs Import and Export Act or give rise to the possibility of a repeal by implication. *Id.* Nothing in the legislative history of either the ESA or the Agriculture statute indicates an intent to withdraw the hides and horns of dead animals from the term "merchandise" in § 545.

ing repeal by implication of previous "patchwork" review scheme for personnel actions because its continued application would subvert the purposes of a subsequently-enacted, comprehensive review scheme); *Roseman,* 364 F.2d at 25. The clandestine introduction of any merchandise into the United States or the importation of any merchandise in a manner contrary to law is punishable under § 545. As its language indicates, § 545 has the rather broad purpose of punishing violations of law respecting the importation of goods. The goals of the ESA are to provide a means of conserving endangered species and the ecosystems they inhabit and to achieve the purposes of certain treaties respecting endangered species. 16 U.S.C.A. § 1531(b) (West 1985). Rather than clashing with the purposes of the ESA, § 545 clearly furthers those purposes by providing an alternative scheme of punishment that is intended to deter importation of wildlife in violation of the ESA. Similarly, the Agriculture statute is intended to "prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals . . . into the United States." 21 U.S.C.A. § 111. Allowing punishment under § 545 for the importation of hides and horns without meeting the country of origin requirement of the Agriculture regulation can only be said to further the purposes of the Agriculture statute. The purposes of § 545 and the regulations promulgated pursuant to the ESA and the Agriculture statute thus are not contradictory and, in fact, are complementary.

In sum, we conclude that the regulations promulgated pursuant to the ESA and the Agriculture statute do not implicitly repeal the application of 18 U.S.C.A. § 545 to Mitchell's actions.[14]

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[14] We have carefully reviewed Mitchell's other enumerations of error and find them to be without merit.

IV.

We hold that the "contrary to law" provision of § 545 encompasses substantive or legislative-type regulations that have the force and effect of law, and that the provision of a misdemeanor penalty for violations of the FWS and Agriculture regulations does not preclude prosecution under the felony provision of § 545.

AFFIRMED

MURNAGHAN, Circuit Judge, dissenting:

When, as here, a defendant does something unpleasant, and does it in an underhanded way, the inclination is to uphold his conviction. However, I do not believe that is the proper and acceptable course when the statute under which he was convicted does not reach him. Accordingly, I respectfully dissent, even though applying the law correctly would lead to a non-serendipitous result.

"The way to remove a fantastic measure from the Statute Book is *not to evade it or ignore it but to enforce it. . . .*"[1] It is not irrational to require Congress, if it means something, to say it. The language of the statute under which defendant Richard M. Mitchell was convicted, 18 U.S.C. § 545, prohibits importation into the United States in a manner "contrary to law." The question presented here is whether law means only statutory law or whether it also extends to Customs Service, Fish and Wildlife Service, and Department of Agriculture regulations. I am in basic agreement with the majority view that if "a conflict existed among § 545, the ESA, and the Agriculture statute, § 545 would control as the more specific statute." Maj. op. at 16-18. Where our ways part is in determining whether § 545 itself is ambiguous. When ambiguity exists, "the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). For the rule of lenity to apply, the ambiguity or uncertainty must be grievous. *Chapman v. United States*, 500 U.S. 453, 463 (1991); *Huddleston v. United States*, 415 U.S. 814, 831 (1974). Unlike the majority, I conclude that it is grievously ambiguous whether failure to comply with a regulation is included within the statutory phrase "contrary to

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[1] A. P. Herbert, *Uncommon Law* 313 (7th ed. 1950) (quoting from *Rex v. The Minister for Drains*).

law," and that the rule of lenity should therefore be applied in Mitchell's case.

First, it must be realized that there are two distinct questions to be addressed. One is whether the regulations involved have the force of law. That regards essentially an issue of whether constitutional power existed in Congress to treat the regulations as law, *i.e.*, whether the regulations are legislative in nature. The majority devotes considerable time to an effort to establish, for that jurisdictional question, that the regulations are law. I am willing, *arguendo*, to accept the reasoning of the majority on that point, but I would dismiss it as irrelevant.[2] I say that because the government has not provided an answer to the second question, namely what the intention, *i.e.*, the meaning, of "law" is in the statutory "contrary to law" language in § 545. An answer that "law" in § 545 also means "regulation" (which does not appear anywhere in § 545), and thus that "law" comes from non-statutory sources, is necessary for the government to prevail.

Giving little attention [3] to the confusion necessarily arising from the fact that many statutes say "law and regula-

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[2] The three cases relied on, *Reves v. Ernst & Young*, 113 S.Ct. 1163 (1993); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); and *Maryland Casualty Co. v. United States*, 251 U.S. 342 (1920), were all civil, not criminal, cases and hence did not address the lenity issue, which for me is the central issue here. It is interesting to note that "[i]n determining the scope of a statute," *Reves*, 113 S.Ct. at 1169, the Supreme Court chose to "mark the limits of what the term might mean by looking again at what Congress did *not* say." *Id.* at 1170. In looking again at § 545, I note that Congress did not say "regulation."

[3] The majority merely states that "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute," maj. op. at 7 n.7 (quoting *Russello v. United States*, 464 U.S. 16, 25 (1983)), yet takes the supposed meaning of § 545 from the promulgated regulations rather than from the enacted statute itself.

tions"[4] and yet § 545 says only "contrary to law," the majority relies on *Estes v. United States*, 227 F. 818 (8th Cir. 1915), but does not refer to other language in the same case pointing to a different conclusion as to the meaning of contrary to law in § 545.[5]

The government has also cited the case of *United States v. Lee*, 937 F.2d 1388 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 977 (1992). It is not readily apparent, however, what view *Lee* supports. *Lee* affirmed convictions for the

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[4] *See, e.g.*, 10 U.S.C. § 618(a)(1); 10 U.S.C. § 5898(a); 14 U.S.C. § 261(a); 14 U.S.C. § 289(f); 14 U.S.C. § 290(d); 22 U.S.C. § 4131(a)(1)(A); 22 U.S.C. § 4137(b)(2); *see also* 10 U.S.C. § 905(1) ("contrary to law, custom, or regulation"); 30 U.S.C. § 823(d)(2)(A)(ii)(III) ("contrary to law or to . . . duly promulgated rules or decisions. . . .").

[5] The *Estes* case, while a regulation was involved, provided no discussion about whether regulations and statutes have different dignity vis-a-vis § 545. However, the court had to distinguish *United States v. Eaton*, 144 U.S. 677, 688 (1892), which held that "if Congress had intended that a violation of the regulations promulgated by the Commissioner of Internal Revenue should be visited by the penalty imposed by section 18 of the act [punishing omission, neglect or refusal to do certain things required by law], it would have said so." *Estes*, 227 F. at 821. (The exact words of the *Eaton* Court are perhaps even more compelling: "If Congress intended to make [violation of the regulations] an offence, . . . *it would have done so distinctly.*" *Eaton*, 144 U.S. at 688 (emphasis added).)

Estes distinguished *Eaton* without referring to the question which attracts our attention here by relying on *United States v. Grimaud*, 220 U.S. 506 (1911), which held that "a conviction for violating the regulations established by the Secretary of Agriculture, regulating the use of forest reservations for grazing and other lawful purposes, should be sustained because *the act of Congress* which authorized the Secretary to establish the regulations also *provided that any violation of the provisions of the act or of such rules and regulations should be punished* as provided in section 5388 [of the Revised Statutes], as amended." (emphasis added). *Estes*, 227 F. at 821. In the instant case there is no such statutory reference to regulations upon which we can rely. *See United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991) (in which the issue of whether "contrary to law" in § 545 included "regulations" was not even discussed), *cert. denied*, 113 S.Ct. 64 (1992).

illegal importation of salmon in violation of the Lacey Act, 16 U.S.C. §§ 3371-78, where the defendant's actions violated a Taiwanese regulation. The applicable penalty provision, § 3372(a)(2), criminalized importations in violation of "any law or regulation of any State or in violation of any foreign law." *Id.* at 1391. The Court noted the "broad definition of the word 'law' " and held that, as with a United States regulation, a foreign regulation was a law for the purposes of section 3372(a)(2). *Id.* However, in making its determination, the Ninth Circuit noted that "[b]ecause the criminal culpability requirements make reference to regulations," it could infer that a foreign regulation also fell within the ambit of the Lacey Act. *Id.* at 1392.

First, *Lee* itself, in its illumination of the statutory language of the Lacey Act, underscores the absence of similar language in § 545. The former speaks of laws and of regulations, while the latter speaks only of law. Second, it was the very inclusion of the term "regulation" that enabled the *Lee* court to infer that Congress intended convictions under the Lacey Act to be premised on foreign, as well as domestic state regulations. *Id.* at 1391. Third, the *Lee* court noted that the provision of 16 U.S.C. § 3373 (d)(1)-(2) that assigns criminal liability once the substantive portion of the Lacey Act has been violated, encompasses knowing violations of "any underlying law, treaty, or regulation." *Id.* at 1392. It was reasoned that since Congress would have intended foreign "law" to have the same meaning throughout the statute, "law" should be read to include foreign regulations. *Id.* Finally, the Ninth Circuit noted that the legislative history suggested that Congress, in re-enacting the Lacey Act, specifically intended to broaden the scope of the Act, thereby including the term "regulation." *Id.* at 1391. Notably to the contrary, when Congress re-enacted the language contained in § 545, it made no change incorporating any reference to "regulation."

The foregoing cases constitute further evidence of the ambiguity and uncertainty surrounding the phrase "contrary to law," since none of them provides definitive guidance in the choice between "contrary to law" on the one hand and "law and regulations" on the other.[6]

Hence, returning to the language of the statute, the meaning of "contrary to law" has not been unambiguously established. Certainly, defendant Mitchell goes too far in asserting that the statute's *plain* meaning is that it refers only to "statutes" and not "regulations," and his argument must be rejected.[7] Section 545 is unarguably ambiguous. The operation of § 545 as well as other statutes, such as the Lacey Act, and of the relevant regulations, creates arguments on both sides. We are faced with a close question with no sure answer.

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[6] The cases relied on by Mitchell are equally unilluminating as to whether or not § 545's "contrary to law" language extends to "regulations." But they contribute abundantly to the creation of ambiguity. *See, e.g., Keck v. United States*, 172 U.S. 434, 437 (1899) ("The words 'contrary to law,' contained in the statute, clearly relate to legal provisions not found in section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the *statutory* regulations concerning the importation of merchandise . . . . because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific *statutory* requirements.") (emphasis added). One sees additional ambiguity in a statement in *Lee*, 937 F.2d at 1397 ("Thus, one must always look to another *statute*, such as the Act, to determine whether a violation of section 545 has taken place.") (emphasis added). There is still more ambiguity in *Palmero v. United States*, 112 F.2d 922, 925 (1st Cir. 1940) ("The penalty imposed under [the statute] is for acts committed 'contrary to law' and to ascertain what is contrary to law reference must be made to some other *statutory* provision.") (emphasis added). None of those cases expressly addresses the question of whether § 545 is intended to cover statutes only, *not including regulations*.

[7] If it takes two to tango, the same may be said of the creation of an ambiguity.

Hence, the question arises whether the rule of lenity should obtain and § 545 should be interpreted to Mitchell's benefit. *See Smith v. United States*, 113 S.Ct. 2050, 2059 (1993) ("venerable rule [of lenity] is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute") (citation and internal quotation omitted); *Chapman*, 500 U.S. at 463 (rule of lenity "not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act") (citation and internal quotation omitted).

We have here no such aid to assist our discovery of § 545's meaning. Hence the cases reveal grievious ambiguity or uncertainty. It is as though the word "day" appeared in a criminal statute with no indication whatever whether (a) twenty-four hours or (b) the period of daylight (excluding night) was intended. Ours is a similar ambiguity and leads us to the conclusion that § 545's phrase "contrary to law," involving the definition of a crime, when the "lenity" principle is applied, does not include regulatory violations.

In my judgment, the conviction under Count Nine should be reversed and, therefore, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 92-00238-A

UNITED STATES OF AMERICA,

v.

RICHARD M. MITCHELL,
Defendant.

ORDER

This case is before the Court on the defendant's motion for judgment of acquittal, or in the alternative, for a new trial. The Court finds that the jury was properly instructed and there was ample evidence before the jury for a finding of guilty, and it is hereby

ORDERED that the defendant's motion is DENIED.

/s/ Claude M. Hilton
United States District Judge

Alexandria, Virginia
August 17, 1993

APPENDIX C

[Filed Aug. 13, 1993]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Case Number: 1:92CR00238-001

UNITED STATES OF AMERICA

v.

RICHARD M. MITCHELL

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or
After November 1, 1987)

THE DEFENDANT:

[ ] pleaded guilty to count(s)

[ ] pleaded nolo contendere to count(s)
which (was) (were) accepted by the court.

[X] was found guilty on count(s) 9 of the Indictment.
after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 USC § 545	Smuggling wildlife into the United States	September 1987	9

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) 2

[X] Count(s) 1, 3, 4, 5, 6, 7 & 8 are dismissed by the Court.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 551-52-2745

Defendant's Date of Birth: 01-26-40

Defendant's USM No.: 18541-083

Defendant's Mailing Address:

207 N. Columbus Street
Arlington, VA 22202
USA

Defendant's Residence Address:

207 N. Columbus Street
Arlington, VA 22202
USA

August 13, 1993
Date of Imposition of Judgment

/s/ Claude M. Hilton
Signature of Judicial Officer

Claude M. Hilton
U.S. District Judge
Name & Title of Judicial Officer

August 13, 1993
Date

PROBATION

The defendant is hereby placed on probation for a term of 2 years.

While on probation, the defendant shall not commit another federal, state, or local crime.

While on probation, the defendant shall not illegally possess a controlled substance.

While on probation, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions:

STANDARD CONDITIONS OF PROBATION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Fine	Restitution
9	$50.00	$1,000.00	
Totals:	$50.00	$1,000.00	

FINE

The fine includes any costs of incarceration and/or supervision.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

Restitution has not been ordered in this case.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:

[ ] in full immediately.

[ ] in full not later than ————.

[ ] in monthly installments of $———— over a period of ———— months to commence 30

days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration.

[ ] in installments to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration. During a period of probation or supervised release supervision payment of any unpaid balance shall be a condition of supervision and the U.S. probation officer shall establish and may periodically modify the payment schedule provided that the entire financial penalty is paid no later than the termination of supervision but in no event no later than 5 years after release from incarceration.

[X] As specified by the Probation Office.

[ ] The defendant shall pay the costs of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States.

All financial penalty payments are to be made to the Clerk of Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary).

Guideline Range Determined by the Court:

Total Offense Level: —

Criminal History Category: —

Imprisonment Range: — to — months

Supervised Release Range: — to — years

Fine Range: $— to $—

[ ] Fine waived or below the guideline range because of inability to pay.

Restitution: $—

[X] Full restitution is not ordered for the following reason(s): Not applicable

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[X] The sentence departs from the guideline range.

This is a pre-guidelines case so the guidelines are not applicable.

OR

[ ] The sentence departs from the guideline range.

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

APPENDIX D

[FILED December 30, 1994]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-5278
CR-92-238-A

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

RICHARD M. MITCHELL,
Defendant-Appellant

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc.

Judge Murnaghan voted to grant panel rehearing. Judges Wilkins and Williams voted to deny.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judge Murnaghan voted to rehear the case in banc, and Judges Ervin, Russell, Widener, Hall, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Michael and Motz voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Wilkins for the Court.

For the Court,

/s/ Bert M. Montague
CLERK

Supreme Court, U.S.
FILED
MAY 26 1995
CLERK

No. 94-1605

In the Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD M. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 545, which establishes felony penalties for the knowing or fraudulent importation into the United States of merchandise "contrary to law," applies to violations of federal regulations having the force and effect of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1605

RICHARD M. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 39 F.3d 465.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1994. A petition for rehearing was denied on December 30, 1994. Pet. App. 36a-37a. The petition for a writ of certiorari was filed on March 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of violating 18 U.S.C. 545, which establishes felony penalties for the fraudulent or knowing importation of merchandise into the United States "contrary to law." He was sentenced to two years' probation and was fined $1,000. The court of appeals affirmed. Pet. App. 1a-27a.

1. Petitioner was employed by the Fish and Wildlife Service (FWS) of the United States Department of the Interior. His job responsibilities included providing advice on the legal requirements for import and export of wildlife, and reviewing applications for wildlife import and export permits. Outside his employment with FWS, petitioner booked and promoted sport-hunting programs overseas. Don Cox, an acquaintance of petitioner's, travelled to the Punjab province of Pakistan, where he hunted and killed two Punjab urials and a Chinkara gazelle, in violation of Pakistani law. Unable to obtain permits to export the hides and horns from Pakistan, Cox arranged for petitioner to smuggle the trophies out of Pakistan and into the United States. On September 25, 1987, petitioner arrived at Dulles International Airport carrying the contraband hides and horns. Petitioner did not declare the hides and horns, nor did he disclose that he was carrying untanned animal hides into the United States. Petitioner also failed to complete an FWS Declaration for Importation or Exportation of Fish and Wildlife Form. Pet. App. 2a.

2. In June 1992 a grand jury returned a nine-count indictment against petitioner. Count Nine (see C.A. App. 28) charged that petitioner's importation of the

hides and horns was in violation of 18 U.S.C. 545, which provides that "[w]hoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law * * * [s]hall be fined not more than $10,000 or imprisoned not more than five years, or both." C.A. App. 28. The importation was alleged to have been "contrary to law" in three respects. First, petitioner's failure to declare the hides and horns on his Customs Service Declaration Form 6059-B violated 19 C.F.R. 148.11 *et seq.* (the Customs regulation). Second, his failure to complete an FWS Declaration for Importation or Exportation of Fish or Wildlife Form 3-177 violated 50 C.F.R. 14.61 *et seq.* (the FWS regulation). Finally, his failure to show the country of origin of the hides and horns on a commercial invoice or in some other manner satisfactory to the Deputy Administrator of Veterinary Services of the Department of Agriculture violated 9 C.F.R. 95.1 *et seq.* (the Agriculture regulation). See C.A. App. 28.

Petitioner twice moved to dismiss the Section 545 charge. In his first motion, he acknowledged that an allegation that he had "violated some independent law *or regulation*" would be sufficient to sustain the indictment. C.A. App. 33 (emphasis added). Petitioner argued that the indictment was insufficient because it failed to allege the manner in which his conduct violated the cited regulations and because two of the regulations were inapplicable to his conduct. *Ibid.* That motion was denied. *Id.* at 59.

Several months later, petitioner filed a second motion to dismiss the Section 545 charge, this time arguing that federal regulations are not "law" within the meaning of Section 545 and that importing merchandise contrary to regulations therefore was not

"contrary to law." C.A. App. 63-67. Petitioner also contended that a felony conviction under Section 545 could not be predicated on a violation of the FWS regulation because Congress had provided a misdemeanor penalty for violation of that regulation. C.A. App. 67-70. The district court denied the motion. *Id.* at 111.

Seven of the nine counts of the indictment were dismissed by the district court. C.A. App. 149. The jury acquitted petitioner of one count (a conflict-of-interest charge) and convicted him of knowingly importing merchandise contrary to law, in violation of Section 545. See C.A. App. 21, 149.

3. The court of appeals affirmed. Pet. App. 1a-27a. Relying in substantial part on *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979), the court held that "the plain meaning of 'law' includes regulations having the force and effect of law." Pet. App. 5a. Finding no evidence in the legislative history that Congress intended to limit Section 545 to statutory violations, the court held that the word "law," within the meaning of Section 545, includes regulations having the force and effect of law. Pet. App. 6a-7a. Because the court found the statute to be unambiguous, it rejected petitioner's contention that the rule of lenity required reversal of his conviction. *Id.* at 7a-8a. Finally, the court rejected petitioner's argument that because Congress had specifically established misdemeanor penalties for violations of the FWS and Agriculture regulations, importation of merchandise contrary to those regulations could not serve as a basis for felony penalties under Section 545. The court noted that "no inherent difficulty exists in Congress' criminalizing the same conduct under two different statutes, one of which provides for

misdemeanor and the other felony punishment." Pet. App. 11a-12a. The court found no evidence that the pertinent FWS and Agriculture statutes were intended to repeal by implication Section 545 as it applied to petitioner's conduct, *id.* at 12a-14a; it concluded as well that "[t]he purposes of § 545 and the [pertinent] regulations * * * are not contradictory and, in fact, are complementary." *Id.* at 20a.

Judge Murnaghan dissented. Pet. App. 22a-27a. He concluded that with respect to the status of federal regulations as "law," "Section 545 is unarguably ambiguous," *id.* at 26a, and that the rule of lenity required reversal of petitioner's conviction. *Id.* at 26a-27a.

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals' holding that the word "law," within the meaning of 18 U.S.C. 545, includes federal regulations having the force and effect of law perpetuates confusion on this issue in the lower courts. That contention lacks merit, and further review is not warranted.

1. The only prior case squarely to address the question whether Section 545 (or its predecessor) applies to the importation of merchandise contrary to federal regulations is *Estes* v. *United States*, 227 F. 818 (8th Cir. 1915). In that case, defendant Estes imported cattle from Mexico without complying with certain regulations established by the Secretary of Agriculture. He was convicted of importing the cattle "contrary to law" in violation of Revised Statutes § 3082 (1878), the predecessor to Section 545. On appeal, Estes argued that the regulation was not a

"law." The court of appeals affirmed the conviction, holding that

> as these regulations were fully authorized by law, and their violation made punishable by law * * *, it must be held, we think, that it was proper to allege in the indictment that the cattle in question had theretofore been imported and brought into the United States from the republic of Mexico contrary to law, as specified in the indictment, so as to bring the charge within the language of section 3082.

227 F. at 821-822.[1]

Petitioner contends that "[a] number of other cases support the conclusion that 'contrary to law' does not reach conduct that violates no statutory provisions." Pet. 7. That contention is unfounded. None of the cases cited by petitioner (see Pet. 7-8) addresses the question whether administrative regulations constitute "law" within the meaning of Section 545. Rather, those decisions contain references to statutory violations simply because the defendants in those cases were charged with importing merchandise in violation of federal statutes. See *Keck* v. *United*

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[1] See also *United States* v. *Ivey*, 949 F.2d 759, 762 (5th Cir. 1991) (court upheld defendants' Section 545 convictions for importing merchandise "contrary to 16 U.S.C. § 1538(c)(1) and 50 C.F.R. § 23.11(b)(1)," though without discussing question whether regulation constituted "law"), cert. denied, 113 S. Ct. 64 (1992); *United States* v. *Murphree*, 783 F.2d 605, 609 (6th Cir.) (administrative regulation will "define for the courts * * * what is contrary to law under 18 U.S.C. § 545" if it is "a 'substantive rule' or a 'legislative-type rule' as described by the Supreme Court in" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301-303 (1979)), cert. denied, 479 U.S. 839 (1986).

States, 172 U.S. 434, 437 (1899) (indictment charged that importation was contrary to unspecified "act of congress"); *Goldberg* v. *United States*, 277 F. 211, 214 (8th Cir. 1921) (underlying violation was importation of whisky in violation of federal statute); *Palmero* v. *United States*, 112 F.2d 922, 925 (1st Cir. 1940) (importation of narcotics in violation of federal statute); *United States* v. *Lee*, 937 F.2d 1388, 1396 (9th Cir. 1991) (importation of salmon contrary to Lacey Act, 16 U.S.C. 3371 *et seq.*), cert. denied, 502 U.S. 1076 (1992); *United States* v. *Menon*, 24 F.3d 550, 558 (3d Cir. 1994) (reimportation of adulterated food in violation of 21 U.S.C. 331); *United States* v. *Claybourn*, 180 F. Supp. 448, 451 (S.D. Cal. 1960) (importation of amphetamines in violation of 19 U.S.C. 1461, 1484, and 1485). There is, therefore, no circuit conflict, or "confusion" (Pet. 9), among the lower courts regarding the question presented by the petition.

2. Petitioner relies primarily (see Pet. 5-6) on this Court's decision in *United States* v. *Eaton*, 144 U.S. 677 (1892), to support his contention that the law is unclear on when and whether administrative regulations constitute "law."

a. In *Eaton*, the defendant was prosecuted under a statute that provided penalties for the failure of an oleomargarine manufacturer to take any action "required by law in the carrying on or conducting of his business." 144 U.S. at 685. The defendant had failed to perform a duty imposed by regulation. The question before the Court was whether the defendant's failure to comply with the regulation constituted a failure to do a thing "required by law." The Court held that compliance with the regulation was not "required by law," reasoning that although regulations "may * * * have * * * the force of

law," nevertheless "it does not follow that a thing required by [regulations] is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence." *Id.* at 688.

This Court has not cited *Eaton* since 1957, when it observed for the second time that "*United States* v. *Eaton* turned on its special facts." *United States* v. *Howard*, 352 U.S. 212, 216 (1957) (quoting *Singer* v. *United States*, 323 U.S. 338, 345 (1945)). The question in *Howard* was whether the Black Bass Act of May 1926, which provided criminal penalties for the transportation of black bass "contrary to the law of the State" from which the fish was transported, applied to fish transported in violation of state regulations. The defendants, relying on *Eaton*, argued that regulations promulgated by the Florida Game and Fresh Water Fish Commission did not constitute "law" within the meaning of the Black Bass Act. The Court rejected that argument, noting that

> [*United States* v. *Eaton*] has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute.

352 U.S. at 216 (quoting *Singer*, 323 U.S. at 345). The Court held that the applicable Florida regulations constituted "law" within the meaning of the Black Bass Act, explaining that "it is beyond question that the Florida Legislature * * * intended to and did make infraction of any commission regulation a

violation of state law, punishable as a misdemeanor." 352 U.S. at 216-217.[2]

b. In *Chrysler Corporation* v. *Brown*, 441 U.S. 281 (1979), this Court further elucidated the analytical framework for determining whether the word "law" in a federal statute includes administrative regulations. In that case, Chrysler argued that the government's disclosure of certain information, done in accordance with administrative regulations, was not "authorized by law" because the regulations were not "law" within the meaning of the Trade Secrets Act, 18 U.S.C. 1905. This Court explained that

> [i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the "force and effect of law." This doctrine is so well established that agency regulations implementing federal statutes have been held to preempt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in § 1905 could be held to have a narrower ambit than the traditional understanding.

441 U.S. at 295-296 (footnotes omitted). The Court examined the legislative history of the Trade Secrets Act, which was initially enacted in 1864, and found "nothing in the legislative history of § 1905 and its

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[2] The Court noted that it "need not decide now whether a state agency could make a rule of such a temporary nature and so unaccompanied by the procedural niceties of rule making that the declaration should not be considered the law of the State for purposes of a statute such as the Black Bass Act," because the defendant "ha[d] not demonstrated that the rule here involved is of such a character." 352 U.S. at 217.

predecessors which lends support to Chrysler's contention that Congress intended the phrase 'authorized by law,' as used in § 1905, to have a special, limited meaning." *Id.* at 298. The Court therefore interpreted the word "law" in Section 1905 to include regulations having the force and effect of law.[3]

Petitioner contends that the legislative history of Section 545 provides the requisite "clear showing" that "law" does not include regulations having the force and effect of law. First, he suggests (Pet. 7) that in light of this Court's 1892 decision in *Eaton*, Congress's reenactment of Revised Statutes § 3082 (1878) (Section 545's predecessor) in 1922 and 1930 indicates that Congress intended the phrase "contrary to law" to exclude regulations having the force and effect of law. That argument is without merit. *Eaton* did not involve Section 545 or its predecessor; rather, the Court construed a different statute governing the manufacture of oleomargarine. Although Congress is presumed to be aware of and to adopt judicial interpretations of a statute when it reenacts that statute without change, the presumption loses force as applied to judicial interpre-

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[3] The *Brown* Court concluded that the particular regulations at issue in that case did not have the force and effect of law because they were not sufficiently related to a delegation of quasi-legislative authority and they were not promulgated in accordance with the procedural requirements of the Administrative Procedure Act. 441 U.S. at 301-316. Petitioner does not dispute, however, that the regulations involved in the present case have the force and effect of law, as the court of appeals correctly held. Pet. App. 8a-11a. Therefore, the only issue presented in this case is whether the word "law" in Section 545 encompasses regulations having the force and effect of law.

tations of unrelated statutes—particularly since (as this Court recognized in *Howard* and *Singer*) *Eaton* did not "state a fixed principle that a regulation can never be a 'law' for purposes of criminal prosecutions." *Howard*, 352 U.S. at 216 (quoting *Singer*, 323 U.S. at 345). As we have explained above, see pages 5-6, *supra*, the only previous judicial decision squarely addressing the applicability of Section 545 or its predecessor to regulatory violations is *Estes* v. *United States*, *supra*, which held that the phrase "contrary to law" in Revised Statutes § 3082 (1878) encompassed such violations. If Congress's reenactment of Revised Statutes § 3082 (1878) in 1922 and 1930 is to be construed as reflecting approval of an existing judicial construction, that construction is to be found in *Estes* rather than in *Eaton*.

Petitioner also cites numerous statutes containing the phrase "contrary to law or regulation," and he contends (Pet. 9-10) that Congress's failure to use that phrase in Section 545 reflects an intent that regulatory violations not be covered. The Court in *Brown* explained, however, that the word "law" is presumed to include regulations having the force and effect of law absent "a clear showing of contrary legislative intent." 441 U.S. at 296. If the mere absence of the word "regulation" could furnish the requisite "clear showing," the presumption articulated in *Brown* would be rendered meaningless.

3. Petitioner also argues that this Court should grant certiorari "to resolve the apparent conflict between application of the rule of lenity and the presumption against implied repeals in the interpretation of ambiguous criminal statutes." Pet. 13. That contention is without merit.

This case does not present any conflict between the rule of lenity and the presumption against implied repeals. Petitioner invoked the rule of lenity in support of his argument that the word "law" does not include regulations. The court of appeals, noting that the rule of lenity applies only when "'grievous ambiguity or uncertainty' remains even after we have looked to the language, structure, and legislative history of the statute," held that the principle did not apply because Section 545 is not ambiguous. Pet. App. 8a (citations omitted). The presumption against implied repeals, by contrast, arose in response to petitioner's argument that, assuming Section 545 does apply to regulations in general, it nevertheless does not apply to two of the particular regulations petitioner violated because Congress has elsewhere provided misdemeanor penalties for violations of those rules. The court of appeals, citing *United States* v. *Batchelder*, 442 U.S. 114, 122-126 (1979), held that there is no inherent conflict between two different statutes criminalizing the same conduct and providing different penalties for its commission. Pet. App. 11a-12a. The court then examined the statutory provisions and their legislative histories and concluded that "there is no reason to infer that Congress, simply by later providing for misdemeanor punishment for violations of the FWS and Agriculture regulations under 16 U.S.C.A. § 1540(b) and 21 U.S.C.A. § 122, intended to preclude prosecution for a felony under § 545." Pet. App. 14a.[4]

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[4] Indeed, the existence of criminal penalties for violations of the FWS and Agriculture regulations undermines rather than supports petitioner's position, since it reinforces the inference that those regulations constitute "law" within the meaning of

Petitioner faults the court of appeals for treating the application of the rule of lenity and the presumption against implied repeals as separate issues, insisting that the two principles are "part and parcel of the same inquiry into the meaning of Section 545." Pet. 12. In fact, the court of appeals' analysis of those issues was fully consistent with this Court's approach in *Batchelder*. In *Batchelder*, as here, the defendant's conduct violated two different statutes, and he was convicted under the statute providing the more severe penalties. The Court rejected his reliance on the rule of lenity: It explained that there was "no ambiguity to resolve" because the defendant's conduct "unquestionably violated" the statute under which he was convicted. 442 U.S. at 121. The fact that the second statute "provide[d] different penalties for essentially the same conduct," the Court asserted, was "no justification for taking liberties with unequivocal statutory language." *Id.* at 121-122. The Court then addressed the question of implied repeal, explaining that "it is not enough to show that the two

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Section 545. See *Howard*, 352 U.S. at 216-217 (Court's conclusion that state regulations are "law" within the meaning of the Black Bass Act is based in part on the fact that "the Florida Legislature * * * intended to and did make infraction of any commission regulation a violation of state law, punishable as a misdemeanor").

It should be noted that 16 U.S.C. 1540(b) and 21 U.S.C. 122 establish penalties for breach of a variety of FWS and Agriculture regulations. Congress's determination that such violations should generally be treated as misdemeanors is in no way inconsistent with its determination that a particular category of regulatory violations—those involving the unlawful importation of merchandise into the United States—should be subject to more severe penalties.

statutes produce differing results when applied to the same factual situation. Rather, the legislative intent to repeal must be manifest in the positive repugnancy between the provisions. In this case, however, the penalty provisions are fully capable of coexisting because they apply to convictions under different statutes." *Id.* at 122 (citations and internal quotation marks omitted). The same analysis is equally applicable here.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] There is also no basis for petitioner's contention (Pet. 10, 12) that a circuit conflict exists regarding the standard for determining whether one statute has impliedly repealed another. Both of the decisions on which petitioner relies—*United States* v. *Omirly*, 488 F.2d 353 (4th Cir. 1973), and *United States* v. *Mueller*, 178 F.2d 593 (5th Cir. 1949)—predate *Batchelder* and are in significant respects inconsistent with its analysis. See Pet. App. 17a n.11.

(3)

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IN THE
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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

None of respondent's assertions detracts from petitioner's central argument that this Court should grant certiorari to resolve longstanding uncertainty as to the proper construction of the phrase "contrary to law" in 18 U.S.C. § 545 and a host of other federal statutes. The overarching question posed by this case is whether courts should presume that this language in a criminal statute excludes regulations as this Court seems to have held previously or presume that it includes regulations as the Fourth Circuit held here. Respondent's argument merely underscores the need for guidance from this Court to resolve the confusion arising from the Court's prior decisions as to what approach to follow in deciding whether a violation of mere regulations is a crime under the terms of many federal criminal statutes.

1. Respondent relies on *Estes* v. *United States*, 227 F. 818 (8th Cir. 1915), as evidence that there is no confusion in the lower federal courts concerning the proper construction of the "contrary to law" provision of

Section 545. Opp. 5-7. As the dissent below makes clear, however, *Estes* itself reflects profound confusion about this Court's decisions in *United States* v. *Eaton*, 144 U.S. 677 (1892), and *United States* v. *Grimaud*, 220 U.S. 506 (1911), both of which addressed the central issue in this case: under what circumstances a violation of regulations is a crime under the terms of a federal criminal statute. See Pet. App. 24a & n.5. In *Eaton*, this Court held that failure to comply with a regulation promulgated pursuant to a statute did not subject a defendant to penalties prescribed in that statute for "omit[ting], neglect[ing] or refus[ing], to do, or caus[ing] to be done, any of the things *required by law*," 144 U.S. at 685 (emphasis added), on the grounds that "[i]f Congress intended to make [violation of the regulation] an offence[,] . . . it would have done so distinctly." *Id.* at 688. In *Grimaud*, the Court employed similar reasoning but reached the opposite conclusion: it distinguished *Eaton* and sustained a conviction for violating regulations promulgated by the Secretary of Agriculture because the statute in question punished violations "of the provisions of this act *or such rules and regulations of the Secretary*." 220 U.S. at 519 (emphasis added).

Despite the lack of any such express reference to regulations in Section 545, the court in *Estes* relied on *Grimaud* to distinguish *Eaton*, thereby flouting the principle of statutory construction enunciated in *Eaton* (and upheld in *Grimaud*) that if Congress intended to make violation of a regulation an offense, "it would have done so distinctly." *Eaton*, 144 U.S. at 688. Not only does respondent's reliance on *Estes* completely overlook the confusion evident in that opinion, it also fails to address the uncertainty arising from other lower federal court cases that underline the ambiguity inherent in Section 545. See, *e.g.*, *United States* v. *Lee*, 937 F.2d 1388, 1397 (9th Cir. 1991) ("one must always look to another *statute* . . . to determine whether a violation of section 545 has taken place"), *cert. denied*, 502 U.S. 1076

(1992) (emphasis added); *Goldberg* v. *United States*, 277 F. 211, 217 (8th Cir. 1921) ("contrary to law" means contrary to "some other act of Congress"); see also Pet. 7-9. Respondent correctly notes that these cases are not dispositive, but, as the dissent below concluded, "the cases reveal grievous ambiguity or uncertainty" as to the proper construction of "contrary to law." Pet. App. 27a.

Moreover, respondent utterly fails to address "the confusion necessarily arising from the fact that many statutes say 'law and regulations' and yet § 545 says only 'contrary to law.'" *Id.* at 23a-24a (footnote omitted). "Contrary to law" is found in at least 30 federal statutes, while numerous other federal statutes define prohibited or reviewable conduct as "contrary to law or regulation." See Pet. 9. The existence of these provisions at the very least demonstrates the ambiguity inherent in the "contrary to law" provision of Section 545, and, moreover, supports this Court's conclusion that when Congress intends to make violation of regulations a criminal offense, it "do[es] so distinctly." *Eaton*, 144 U.S. at 688. Certiorari is warranted in this case to ensure a uniform approach to interpreting the language "contrary to law" in federal criminal statutes, particularly given that this issue of statutory construction implicates the imposition of criminal liability and the loss of individual liberty.

2. Respondent's reliance on *United States* v. *Howard*, 352 U.S. 212 (1957), is misplaced. See Opp. 8-9, 11. In *Howard*, this Court held that a Florida regulation was a "law" for purposes of a federal statute making it unlawful to transport fish if such transportation was "contrary to the law of the State" from which the fish was transported. 352 U.S. at 213, 219. The Court found that *Eaton* was inapposite and that "[i]t ha[d] not been construed to state a fixed principle that a regulation can never be a 'law' for purposes of criminal prosecutions." *Id.* at 215-16 (quoting *Singer* v. *United States*, 323 U.S.

338, 345 (1945)). *Howard*, however, does not control this case for a number of reasons.

First, the holding in *Howard* was based in part on a finding that Congress clearly intended to extend the prohibitions of the statute to regulatory violations. *Id.* at 218. The Court cited legislative history of the statute which explicitly stated that "the Federal Government must collaborate in the enforcement of protective laws *and regulations*." *Id.* at 219 (emphasis added). In contrast, respondent points to nothing in the legislative history of Section 545 that evinces congressional intent to bring regulatory violations within the ambit of that statute. In fact, the panel below observed that when the "contrary to law" provision now codified at Section 545 was reenacted as part of the Tariff Acts of 1922 and 1930, other provisions of the Acts referred explicitly to "law and regulations," thus supporting the inference that "contrary to law" does not embrace "regulations." See Pet. App. 6a-7a n.6.

Second, the *Howard* Court's observation that *Eaton* did not hold that a regulation can never be a "law" for purposes of criminal prosecutions derives from *Singer* v. *United States*, 323 U.S. 338 (1945), which stated, in pertinent part, that

> *United States* v. *Eaton* turned on its special facts, as *United States* v. *Grimaud*, 220 U.S. 506, 518-519, emphasizes. It has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute.

323 U.S. at 345. The Court then noted that Congress had not prescribed criminal penalties for violations of the regulations at issue in *Eaton*, but that the statute at issue in *Singer* made it a felony for a person to "fail or neglect to perform any duty required of him under or in the execution of this Act, or *rules or regulations made pur-*

suant to this Act." *Id.* (emphasis added). *Singer* is premised, therefore, on the same distinction that this Court drew in *Grimaud* and *Eaton* between statutes that expressly punish violations of regulations and those, like Section 545, that do not. For this reason, respondent's reliance on *Howard* does nothing to detract from the conclusion that the lack of any express reference to regulations in Section 545 creates "grievous ambiguity" and confusion as to the scope of that statute.[1]

3. Respondent's assertion that "[t]his case does not present any conflict between the rule of lenity and the presumption against implied repeals" wholly misses the point. Opp. 12. Respondent, like the panel below, attempts to divorce the construction of "contrary to law" from the question of repeal by implication, when, in fact, the issues are inexorably linked.

In *United States* v. *Batchelder*, 442 U.S. 114, 121-22 (1979), this Court addressed the issue of implied repeals and held that no conflict inheres in the fact that two statutes provide different penalties for the same conduct. In that case, however, the Court found that there was "no ambiguity to resolve" because the defendant's conduct "unquestionably violated" the statute under which he was convicted. *Id.* at 121. In this case, however, application of *Batchelder* simply begs the question. There

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[1] Respondent's reliance on *Chrysler Corporation* v. *Brown*, 441 U.S. 281 (1979), is wholly unpersuasive. *See* Opp. 9-11. As the dissent below observed, *Brown* was a civil case and therefore did not implicate the application of the rule of lenity, which is central to resolution of this case. *See* Pet. App. 23a n.2. Moreover, the Court in *Brown* found nothing in the legislative history of the statute in question to indicate that the phrase "authorized by law" did not extend to administrative regulations. 441 U.S. at 298. The legislative history of the "contrary to law" provision of Section 545, however, suggests otherwise. As discussed *supra* at 4, the use of "law and regulations" elsewhere in the Tariff Acts of 1922 and 1930 is powerful evidence derived from the structure of the Act that Congress did not intend for the "contrary to law" provision in those statutes to encompass regulations.

is in fact "ambiguity to resolve" regarding the proper construction of "contrary to law," and Congress's specific provision of misdemeanor penalties for violations of two of the regulations at issue here only deepens that ambiguity. Under these circumstances, *Batchelder*'s presumption against implied repeals runs headlong into the rule of lenity.

This Court's decision in *Simpson* v. *United States*, 435 U.S. 6 (1978), suggests that it is improper to rely on *Batchelder* to resolve an apparent conflict between two criminal statutes when, as here, it is unclear whether one of the statutes even reaches the conduct at issue. See Pet. 12. This Court should grant certiorari to resolve the tension between the application of the rule of lenity and the *Batchelder* presumption against implied repeals in the context of ambiguous criminal statutes.

4. In sum, petitioner is not claiming, as the United States seems to suggest, that the term "contrary to law" has one inexorable statutory definition that excludes "regulations." Rather, petitioner's contention is that, because Congress knows how to "distinctly" include "regulations" when it so chooses, Congress's use of the statutory term "contrary to law" in a criminal statute should give rise to a presumption that regulations are not included. That presumption could be sustained, as it was in *Eaton*, or overcome by a contrary finding of congressional intent, as in *Howard*. But, in this case, the court below applied the opposite presumption and concluded—in the face of contrary evidence of congressional intent—that the term "contrary to law" included regulations. That holding simply cannot be reconciled with existing precedent, no matter how this Court's prior decisions are parsed. Accordingly, certiorari should be granted to resolve whether the widely-used statutory term "contrary to law" in a criminal statute is presumed to include, or exclude, a violation of administrative regulations.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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